money is so far identified as to be placed in the same general account as the trust fund.[18] Thus the stock cases can hardly rest upon the ground that stock is fungible.

Upon a review of the cases it is hard to avoid the conclusion that in administering the Bankruptcy Act the federal courts have in two classes of cases violated at least the spirit if not the letter of that act. Furthermore, in at least one case a federal court has shown that it is not unfamiliar with the true construction of the act, namely, that a transfer, within four months prior to bankruptcy, of a property interest by a debtor to a creditor who knows the financial condition of the debtor, is a preference.[19]

LIABILITY OF A PHYSICIAN FOR REVEALING OUT OF COURT HIS PATIENT'S CONFIDENCES. — It is curious that not until 1920 should a court of last resort [1] have been called on to determine a physician's liability for voluntarily revealing out of court a patient's confidences. In *Simonsen* v. *Swenson* [2] the Supreme Court of Nebraska held that a physician who disclosed to the landlady of his patient the fact that the patient was, on his diagnosis, suffering from syphilis, was not liable to the patient in damages for such a revelation. The significance of this decision has not failed to stir the medical world.[3]

Heretofore the tendency in the United States had been to seal the doctor's lips — to seal them at a time when they might justifiably [4] have been open. By statutes,[5] widely adopted since 1828,[6] a patient's communications to his doctor (like a client's to his attorney) have been declared inadmissible as evidence. The sponsors of such statutes have sought to support this doctrine of privilege [7] by reasoning which really

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[18] Board of Commissioners *v.* Strawn, *supra;* Mercantile Trust Co. *v.* St. Louis Ry., 99 Fed. 485 (1900); Hewitt *v.* Hayes, 205 Mass. 356, 91 N. E. 332 (1910).

[19] Clarke *v.* Rogers, 183 Fed. 518 (1910). See also the dissenting opinion in Duel *v.* Hollins, *supra*, 530. The English cases cannot be taken as authority in this matter, for by the English law a transfer is not preferential unless the controlling motive was an intent to prefer. *Ex parte* Taylor, 18 Q. B. D. 295 (1886); Sharp *v.* Jackson, [1899] A. C. 419; *Ex parte* Dyer, [1901] Q. B. 710.

[1] The question has apparently never been squarely presented in England. See "Medical Men and Professional Secrecy," 79 JUST. P. 3. And it is no less novel in the United States. See Simonsen *v.* Swenson, 177 N. W. 831 (1920).

[2] 177 N. W. 831 (1920). See RECENT CASES, p. 334, *infra.*

[3] See 75 JOUR. AM. MED. ASSOC. 1207.

[4] In practice, the privilege has not proved an unmitigated blessing, and has been severely criticized as a means of cloaking fraud. See 4 WIGMORE, EVIDENCE, § 2380; Albert Bach, "The Medico-Legal Aspect of Privileged Communications," 10 MEDICO-LEGAL JOUR. 33; 1 HAMILTON, SYSTEM OF LEGAL MEDICINE, 626.

[5] At common law there was no privilege. See The Duchess of Kingston's Trial, 20 How. St. Tr. 355, 574 (1776). This has been deplored by occasional English *dicta:* Buller, J., in Wilson *v.* Rastall, 4 T. R. 753, 760 (1792); Brougham, L. C., in Greenough *v.* Gaskell, 1 My. & K. 98, 103, 39 Eng. Rep. 618, 620 (1833). But the law remains unchanged to-day in England, as it does in those American States which have not adopted the statutory innovation of privilege. Banigan *v.* Banigan, 26 R. I. 454, 59 Atl. 313 (1904).

[6] In this year the privilege was first established by statute passed in New York. For a list of those states which have subsequently followed New York's lead, see 4 WIGMORE, EVIDENCE, § 2380.

[7] See 3 COMMISSIONERS ON REVISION OF THE STATUTES OF NEW YORK, 737 (1836);

explains the doctor's general duty of non-disclosure. The reason, thus unhappily misapplied, is: "if the lips of the physician are not sealed, the patient may elect to deceive him rather than have his body cured at the expense of his liberty or reputation." [8] To deny the merit of the privilege is not also to deny this reasoning. As a practical matter, it must be apparent that the social interest in free communication between the sick and their medical advisers will be fostered by the existence in the patient's mind of an assurance that his doctor is obliged not to betray what he professionally learns.

Lord Mansfield declared that the physician who voluntarily revealed out of court his patient's confidence "was guilty of a breach of honor and of great indiscretion." [9] And there is an ethical consideration that such a practice must weaken the dignity and honor of the medical profession. Thus, in the case of *Simonson* v. *Swenson*, what is the doctor but the mere appanage of the hotel that hires him? [10] By his betrayal of confidence he has destroyed his patient's trust and his own individuality.

These practical and ethical considerations have a legal counterpart. It has been suggested that this revelation by the doctor is a breach of a condition of secrecy implied in law, essential to the contract between physician and patient.[11] But need we resort to the fiction of an implied condition where the disclosure is, in fact, a clear breach of the duty arising out of the doctor's confidential relation to his patient? [12] In our law, when two men enter into a relation, duties arise. If the relation is one of inherent trust and confidence, the law gives effect to such duties, just as in the older period of equity and natural justice the chancellors infused morals into the law by requiring of fiduciaries a high degree of faith in the performance of their obligations not required by strict law. Here the duty, as even the court in *Simonsen* v. *Swenson* admits,[13] is to preserve inviolate the patient's secret.

The existence of this duty has recently been fully acknowledged by the British Medicial Assocation,[14] and the duty itself is incorporated in the French Penal Code [15] and in statutes of American states.[16] The

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3 WHARTON AND STILLÉ, MEDICAL JURISPRUDENCE, 4 ed., § 567. See also Edington *v.* Insurance Co., 67 N. Y. 185, 194 (1871).

[8] See COOLEY, LAW OF TORTS, 2 ed., 620.

[9] See The Duchess of Kingston's Trial, *supra*, 574.

[10] The defendant "acted as . . . hotel doctor when one was needed." See Simonsen *v.* Swenson, note 2, *supra*.

[11] See 64 JUST. P. 241, 242, and the reference therein to the holding in AB *v.* CD, *infra*.

[12] See the opinions of Lord Fullerton and Lord Ivory in AB *v.* CD, 14 Court of Sess. Ca. 177, 180 (1851). In Smith *v.* Driscoll, 94 Wash. 441, 162 Pac. 572 (1917), the court refused to discuss whether a cause of action lay in favor of a patient whose physician wrongfully divulged confidential communications: ". . . it will be assumed that for so palpable a wrong the law provides a remedy."

[13] See note 2, *supra*, 832.

[14] See a recent vote of this body quoted in 75 JOUR. AM. MED. ASSOC. 1438.

[15] See CODE PÉNAL, art. 378. "*Les medecins . . . et toutes autres personnes depositaires, par état ou profession, des secrets qu'on leur confie, qui, hors le cas où la loi les oblige à se porter denonciateurs, auront révélé ces secrets, seront punis d'un imprisonnement, etc., etc. . . .*" For an example of the rigid enforcement of this provision, see the extraordinary case of Cass., 19 *déc.*, 1885, Watelet.

[16] 1913 NEB. REV. STAT., § 2721, provides that a doctor's license may be revoked for the "betrayal of a professional secret to the detriment of the patient." And see 1913 MICH. STAT., § 5110.

duty is absolute with regard to the physician. Yet there are clearly occasions when this duty must give way before the paramount interests of society. First, when, in the absence of the statutory privilege, the physician testifies as witness.[17] The pursuit of justice may naturally abrogate any inferior duty. Second, when, in accordance with statutory enactment,[18] he informs the properly constituted authority of his patient's disease.[19] Here, the mandate of the legislature, growing from "the fundamental principle — *salus populi suprema lex*" [20] — is to be obeyed without question and without fear of liability. So well has statute kept pace with the progress of medicine that it is difficult to-day to imagine any contagion (seriously menacing many lives, if kept secret) which physicians are not required by law to report. But should a case arise which is not covered by statute, a report to proper authorities (or perhaps even to an individual) could doubtless be justified by showing emergency.

But in *Simsonsen* v. *Swenson* the disclosure was volunteered to a private individual without the justification of witness box, statute, or emergency.[21] The case stands for the triumph of medical altruism over legal duty. It sanctions the assumption by the doctor of the police power of the state with regard to disease in contravention of his relational duty to his patient, and grants to the obligor the discretion to perform his duty or not. It is difficult to see how any branch of the government other than the legislative can properly create in any individual so wide a discretion.

DECISIONS WITHOUT OPINIONS. — The failure of the majority of the United States Supreme Court to assign reasons for their conclusions in the cases on the Eighteenth Amendment [1] has been the subject of criticism.[2] That the Court should refuse to discuss paramount questions like the concurrent enforcing power of Congress and the States, and the validity of the Amendment is itself worthy of comment, especially in view of a feeling on the part of a minority of the profession that the power to amend the Constitution is subject to implied limitations.[3] And such summary disposition of the cases raises also the larger question of the value and function of opinions in our law.

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[17] See 4 WIGMORE, EVIDENCE, § 2380 for cases on this point.

[18] Such statutes are generally adopted in the United States. See 1902 MASS. REV. STAT., c. 75, § 50 (amended 1907, 480); 1910 N. J. COMP. STAT. HEALTH, § 247; 1918 N. Y. CONS. LAWS, c. 49, § 25.

[19] Brown *v.* Purdy, 54 Super. Ct. N. Y. 109, 8 N. Y. St. Rep. 143 (1886).

[20] See 1 HAMILTON, SYSTEM OF LEGAL MEDICINE, 2 ed., 633.

[21] The words employed by the physician were actionable *per se*. An action of slander may be met with the justification of truth or the excuse of privilege. The obligation in the ordinary man not to volunteer such words unless he has an actual duty to speak is so enhanced in the case of a physician by his duty not to disclose a professional secret that it would seem impossible to claim for a doctor the common-law defeasible privilege.

[1] Rhode Island *v.* Palmer, U. S. Sup. Ct., No. 29 Original, Oct. Term, 1919 (June 7, 1920).

[2] See concurring and dissenting opinions in Rhode Island *v.* Palmer, *supra*.

[3] See William L. Marbury, "Limitations upon the Amending Power," 33 HARV. L. REV. 223. See 33 HARV. L. REV. 968.